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From: Brian Litmans [mailto:blitmans@trustees.org]
Sent: Wednesday, May 01, 2013 10:35 AM
To: Cohon, Keith
Subject: Law360 article re Seward case

Keith,

This article was written by John Martin and Susan Mathiascheck (counsel for AES). I thought you might be interested in the "Implications" at the bottom of the article:

Alaska Tests The Scope Of CWA

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Law360, New York (April 30, 2013, 12:05 PM ET) --
In a decision addressing fundamental Clean Water Act issues, the U.S. District Court for the District of Alaska dismissed the principal claims in a citizen suit brought against Aurora Energy Services LLC (AES) and the Alaska Railroad Corporation. Alaska Community Action on Toxics v. Aurora Energy Services LLC, No. 3:09-cv-00255-TMB (D. Alaska March 28, 2013).


Susan Mathiascheck

The plaintiffs, two environmental groups, claimed that AES and Alaska Railroad had violated the CWA by discharging coal in various forms (including coal "carry back" and airborne dust), without a permit. Relying on the statute's "permit-shield" provision and "point-source" requirement, the court dismissed all but one of plaintiffs' claims and largely granted defendants' motion for summary judgment.

Background

Two organizations, Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club, initiated this suit in 2009 against Alaska Railroad and AES as the owner and operator, respectively, of the Seward Coal Loading Facility in Seward, Alaska, located near Resurrection Bay.

As described in the opinion, this facility stores and loads coal onto ships for export. Slip Op. at 4. Various features at the facility, including stockpiles for storage, a conveyor for transportation of coal, a ship loader and a "stacker-reclaimer" for moving coal to and from the stockpiles, facilitate the coal loading process. Id.

The Seward facility has a lengthy permitting history. Although the facility's discharges were previously authorized under an individual permit, since 2001, at the U.S. Environmental Protection Agency's suggestion, the facility has operated pursuant to the EPA's multisector general permit for stormwater discharges. Id. at 8-9.

Later, in 2009, the EPA reauthorized coverage under the general permit. Coverage under the general permit continued when the Alaska Department of Environmental Conservation assumed authority over the permitting program.

In their suit, the plaintiffs claimed that the Seward facility violated the CWA as a result of discharges outside the scope of the facility's permit coverage and specifically claimed three different bases for finding violation of the statute: spillage of coal during conveying and loading, migration of airborne dust to the nearby bay and discharge of "coal-contaminated snow."

Plaintiffs and defendants each filed cross-motions for summary judgment with respect to all three claims.

District Court Opinion

Judge Timothy Burgess granted summary judgment to AES and Alaska Railroad on the first two claims and much of a third claim. He denied the plaintiffs' cross-motion for summary judgment. The decision left a narrow factual issue on the third claim for trial.

As to the first claim, plaintiffs had alleged that small amounts of coal fell to the bay, "either directly or as coal dust" in the course of the coal loading process, and that these discharges were not covered under the facility's general permit authorization. Id. at 5, 16. The court agreed with plaintiffs that such discharges of coal were not "stormwater" and therefore not "expressly allowed" by the general permit. Id. at 19.

However, the court also held that AES and Alaska Railroad could not be held liable for these discharges because the statute's "permit shield" applied.[1] Id. at 19. The court recognized numerous express references to the coal discharges in the facility's stormwater pollution prevention plan, as well as repeated inspections by the EPA and state permitting authorities, indicating that such spillage was "actively regulated by the agencies under the general permit." Id. at 30.

Based on this and other evidence, the court concluded that discharges of coal were "not specifically

prohibited by the general permit and ... were adequately disclosed to and reasonably anticipated by EPA" and thus fell within the protection of the permit shield. Id. at 19. Accordingly, the court dismissed the plaintiffs' first claim.

The court also dismissed the plaintiffs' second claim that airborne coal dust, blown by wind from assorted facility equipment and stockpiles to Resurrection Bay, gave rise to a violation of the CWA. Resolution of this issue turned on the CWA's requirement that a discharge originate from a "point source"[2] in order to fall within the statute's permit requirement.

Relying on precedent from stormwater and other cases, the court denied the plaintiffs' airborne dust claim for lack of any "discernible, confined and discrete conveyance" as is required for a point-source discharge. Id. at 36. Thus, the court rejected the argument that the plaintiffs need only show that "the pollutant originated from an identifiable source" for a case to be actionable under the CWA. Id. at 40.

Lastly, the court addressed the plaintiffs' claim that the defendants had improperly discharged coal-contaminated snow without a permit. Specifically, the plaintiffs had alleged that contaminated snow fell through cracks in the loading dock and that the defendants had plowed contaminated snow into various waters covered under the act. Id. at 41.

As to the plaintiffs' first allegation of snow falling through the cracks, the court agreed with the defendants "that Plaintiffs have not presented evidence sufficient to establish a CWA violation." Id. Alternatively, the court held that these discharges either fell within the permit shield or were not subject to CWA regulation. Id.

The court left intact only one part of the third count: an uncorroborated allegation that coal-contaminated snow had been plowed directly into Resurrection Bay and the adjoining beach. The court found a conflict in factual evidence that amounted to a "material issues of fact" precluding summary judgment. Id. at 43.

Implications

Burgess' decision may serve as precedent in future litigation implicating the CWA's permit shield or in cases concerning "airborne" emissions. Given the critical need for industrial dischargers to rely on CWA permits as authority for their discharges, this decision's endorsement of the permit-shield defense could prove helpful in preventing future actions against permittees for permitting decisions made by government agencies.

Moreover, the plaintiffs' theory that a CWA permit is required for fugitive dust emissions that fall into surface waters threatened a massive expansion of CWA authority that could have meant that permitting is required for a myriad of dust-producing locations, ranging from playgrounds to parking lots. Rejection of

this theory may serve as one precedent limiting the scope of the act.

--By John C. Martin, Susan M. Mathiascheck and Kyle W. Parker, Crowell & Moring LLP

John Martin, Susan Mathiascheck and Kyle Parker are partners in Crowell & Moring's environment, energy and resources group. Crowell & Moring represented Aurora Energy Services LLC in the litigation highlighted in this article.

This article was first published by Crowell & Moring LLP as a client alert.